information, including information that would reveal Cox's expansion and promotional activities.[177]

By itself, the risk that such activity will occur is enough for the Commission to reject Verizon's proposal. Moreover, the possible danger to Cox far outweighs any likely benefit to Verizon or consumers that might accrue from monitoring. The Commission must reject Verizon's proposal.

VI. Pricing Terms and Conditions – Verizon's Rates Should Not Be Used to Set a Cap on Cox's Rates. [Issue I-9]

Verizon attempts to couch its proposal for resolution of Issue I-9 as a request that Cox "commit to just and reasonable rates."[178] This is just Verizon's euphemism, however, for its demand that Cox commit to Verizon's rates, in effect imposing an unneeded and unreasonable contractual cap on the rates Cox charges. Because there is no basis for such a rate cap, Verizon's proposal must be rejected.[179]

Verizon already is protected adequately from "excessive" Cox rates by regulatory mechanisms at both the federal and state level.[180] Verizon concedes that in the event that it ever found a Cox rate unreasonable, it could dispute that rate under the applicable terms of the parties' interconnection agreement, and then take the dispute to the appropriate regulatory body.[181] As the evidence shows, however, Verizon never has availed itself of any complaint process or attempted to show that any Cox rate is unreasonable.[182] Asked to provide examples of

[177] Collins Direct at 29.
[178] Verizon Exhibit 11, Direct Testimony of Michael A. Daly, Donna Finnegan, and Steven J. Pitterle Regarding Pricing Terms and Conditions at 7.
[179] Verizon's proposal for Issue I-9, as expressed in the November JDPL is subject to Cox's Objection. Although Cox is responding to language in the November JDPL, it does not waive the rights addressed in the Objection.
[180] Collins Direct at 32; Collins Rebuttal at 47-48
[181] Cox Exhibit 24.
[182] Cox Exhibit 23.

rates that it finds excessive, Verizon could only cite to what amounts to a contractual billing dispute over the applicability – not the amount – of late fees.[183] Therefore, Verizon's proposal is entirely unnecessary.

Moreover, as a factual matter, Verizon rates are not an appropriate measuring stick for Cox rates because Cox's costs can be higher than Verizon's.[184] Indeed, there are many cases in which other Virginia ILECs charge higher rates than Verizon (and Cox), so there is no reason to believe that Verizon's rates even represent the "correct" ILEC rates.[185] Capping Cox rates, therefore, could result in Cox providing services to Verizon at below-cost rates.[186] This result is not justified by Verizon's claim that reciprocal rates are necessary because Verizon is required to purchase some services from Cox.[187] There is no relationship between Verizon's statutory obligations and Cox's costs. Verizon also fails to mention that Cox's common carrier obligations under both federal and Virginia law give Verizon the right to the same rates offered by Cox to other customers for the same service.[188] Cox's potential inability to recover its costs under Verizon's September JDPL proposal renders that proposal patently unreasonable.

Verizon's November JDPL attempts to remedy this defect by altering Verizon's position to allow Cox to exceed Verizon's rates if and only if Cox demonstrates to the Commission, the Virginia SCC or Verizon itself that Cox's costs exceed Verizon's rates and (unless Verizon consents to the higher rates) the Commission or the Virginia SCC orders Verizon to pay those rates.[189] This remedy is illusory. First, given Verizon's belief that its rates represent "just and

[183] Cox Exhibit 22.
[184] Collins Direct at 31-32; Collins Rebuttal at 50.
[185] Collins Rebuttal at 47.
[186] Collins Direct at 32.
[187] Verizon Answer at 171.
[188] Collins Rebuttal at 48.
[189] November JDPL at 1-2.

reasonable rates," it is highly unlikely that Verizon itself would agree that higher Cox rates are acceptable.[190] Second, Verizon's proposal gives no indication of how Cox would go about gaining Commission or Virginia SCC approval for a higher rate, or which agency is the appropriate body from which Cox should seek such approval.

This omission is significant because there is no process by which Cox could, under normal circumstances, receive the approval that Verizon would require. At the federal level, the Commission almost never approves tariffs. Rather, a company files a tariff and it goes into effect unless the Commission acts to suspend or reject it.[191] The Communications Act and the Commission's rules do not accommodate any other process. In fact, even when a party objects to a tariff, the Commission almost never rules on the validity of the tariff as a whole, but instead responds only to the specific complaint.[192]

Similarly, at the state level, CLEC rates are deemed presumptively reasonable, and rates above those charged by ILECs are permitted "unless there is a showing that the public interest will be harmed."[193] Even these rate regulations do not apply to any services "comparable to services classified as competitive for the incumbent.[194] Thus, there is no clear path for Cox to obtain affirmative approval for either intrastate or interstate rates, and, consequently Verizon's new proposal would not give Cox any more flexibility than its original language.

[190] Verizon's proposed language apparently gives Verizon the sole discretion to determine, in the first instance, whether Cox has made a sufficient showing that its higher costs justify a higher rate. *Id.*
[191] Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Notice of Proposed Rulemaking*, 11 FCC Rcd 7141, 7147-48 (1996) (citing *Memorandum Opinion and Order*, 8 FCC Rcd 6752 (1993) Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, *First Report and Order*, 85 FCC 2d 1 (1980)).
[192] *See, e.g.*, MCI Telecommunications Corp. v. U.S. West, 15 FCC Rcd. 9328 (2000) (dismissing challenge to tariffed PIC charges).
[193] VAC5-400-180.D.3.c.d. Cox's Virginia rates appear in a tariff, but there is no pre-approval process for that tariff. Cox files the tariff and it is deemed reasonable unless a party objects.
[194] *Id.*

Even if there were a real opportunity for Cox to obtain regulatory approval for higher rates, the new Verizon language would be unreasonably burdensome. Cox would not be permitted to charge higher rates until there was an "unstayed order" from either the Virginia SCC or the Commission "directing that Verizon pay the higher rate or charge."[195] Of course, forcing Cox to go through the trouble and expense of obtaining such an order would defeat the purpose of subjecting CLECs to less rigorous rate regulation than ILECs. Moreover, as Verizon has shown in the past, any such order would be subject to endless rounds of litigation as Verizon sought review of any determination that Cox's higher rate was cost-justified.[196]

Finally, Verizon's price cap proposal, in either of its forms, is inconsistent with both federal and Virginia state law. Under federal law, Cox is a non-dominant carrier, and its rates are presumptively lawful.[197] The Commission has determined that it can rely on the complaint process to address any potentially unreasonable rates charged by nondominant carriers like Cox.[198] Verizon has provided no basis in this proceeding for the Commission to make an end-run around this policy by imposing a de facto cap on Cox's rates.

Similarly, Virginia law only subjects CLEC rates to price caps, and rates above those charged by ILECs are permitted "unless there is a showing that the public interest will be harmed" or if a CLEC service is "comparable to services classified as competitive for the incumbent."[199] Moreover, the Communications Act does not give state commissions or, by extension, the Commission, the power to set CLEC rates for anything other than reciprocal

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195 November JDPL, Pricing Terms and Conditions at 1-2. During the period while Cox was waiting for approval it would be placed in the untenable position of having to either forego charging its new rates to all customers or making itself subject to claims from other customers that it was discriminating in favor of Verizon.
196 *See e.g.*, PUC 97 0069 Final Order, Virginia State Corporation Commission (Oct. 24, 1997). *See also Cox Virginia Telcom, Inc. v. Verizon South*, File No. EB-01-MD-006.
197 Cox Petition at 20 & n.15.
198 Collins Direct at 32; Collins Rebuttal at 48.
199 VAC 5-400-188.D.3.c.d. Indeed, for competitive services, Verizon might well seek to undercut Cox's prices.

compensation in arbitration proceedings. The only other rate setting provisions of section 252 of the Act apply exclusively to ILECs.[200] The Commission has held that state commissions do not have comparable authority to set CLEC rates and that under section 51.223 of the Commission's Rules, states do not have the authority to impose any interconnection obligations on CLECs other than those contained in the Act.[201] Consequently, Verizon's attempt to limit Cox rates through its own rate regulation process is flatly inconsistent with current law.

Therefore, regardless of whether the Commission considers Verizon's September or November JDPL proposal for Issue I-9, that proposal must be rejected. In either form it is unjustified, unreasonable, and unlawful.

VII. General Terms and Conditions – There Is No Reason to Adopt Special Provisions Permitting Verizon to Terminate Access to OSS. [Issue I-11]

For Issue I-11, Verizon proposes contract language that would enable it to terminate Cox's access to Verizon's Operational Support Systems ("OSS") as a penalty for Cox misuse of them.[202] This proposal should be rejected because it is unnecessary in light of other contractual provisions and is unwarranted by the minor concerns identified by Verizon. The proposal also should be rejected because it creates risks to competition.

Verizon's OSS termination proposal is entirely unnecessary in light of agreed-to contractual provisions that already give Verizon the right to (1) terminate the agreement for substantial and material breach; and (2) interrupt or suspend OSS access if Cox's use of the OSS interferes with or impairs the OSS or is likely to do so.[203] To remedy Verizon's concerns on this

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[200] 47 U.S.C. § 252(d); *see also* 47 U.S.C. § 251(c)(3), (4).
[201] *Local Competition Order,* 11 FCC Rcd. at 16109; 47 C.F.R. § 51.223.
[202] Verizon Answer at 74.
[203] Collins Direct at 36 (citing § 22.6 of the Cox proposed agreement); Cox Petition, Exhibit 2 at 33 (Section 9.3.1 of proposed agreement).

matter, Cox has proposed that non-compliance with the OSS provisions of the agreement be explicitly deemed a material breach.[204] Moreover, Verizon witness Mary Ellen Langstine agreed that any OSS violation significant enough to trigger Verizons's OSS termination rights would be a substantial and material breach of the agreement.[205] There is, therefore, no reason for a separate OSS termination provision.

In addition, the evidence produced in this proceeding shows that CLEC misuse of OSS is not a serious problem. Asked to provide examples of CLEC misuse in Virginia, Verizon provided evidence of only eight infractions, committed by only two carriers (neither of which was Cox), none of which would have justified termination, and all of which were addressed promptly.[206] Indeed, Verizon has conceded that there has never been an OSS abuse of sufficient magnitude to justify termination.[207] Those abuses that have occurred have caused no permanent damage to the Verizon OSS, but rather have resulted in slowdowns in the performance of the Web graphical user interface ("GUI").[208] Simply put, the problem that Verizon seeks to cure is not significant enough to subject Cox to the risks that would stem from Verizon's possession of such a termination right.

Verizon has several options for combating unlawful use of OSS without resort to a unilateral termination provision. It can and has changed its software to make abuse more difficult.[209] In addition, Verizon can and has worked with CLECs to develop standards to govern

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[204] Collins Direct at 36.
[205] Tr. at 2534 (Langstine).
[206] Cox Exhibit 26; Tr. at 2576 (Langstine).
[207] Tr. at 2586 (Langstine).
[208] Cox Exhibit 27; Tr. at 2536-37 (Langstine). Cox is not arguing that Verizon should not seek to maintain prompt response times in the Web GUI. However, slower GUI performance is not, by itself, justification for onerous remedies, a point Verizon concedes. Tr. at 2577-79 (Langstine).
[209] Tr. at 2538-39 (Langstine).

OSS use and improve its performance.[210] But perhaps the greatest protection that Verizon can have from significant CLEC abuse of OSS is that, given the importance of Verizon OSS to CLECs' business, CLECs have no incentive to jeopardize the smooth functioning of Verizon's OSS interfaces.[211] The evidence in this proceeding, therefore, shows that Verizon is already sufficiently protected from any realistic threat to OSS.

Approval of Verizon's proposal also would create several risks to Cox and other CLECs. The first is that Verizon will abuse its termination power. Verizon might, for example, use termination threats to attempt to change Cox's use of OSS. Giving Verizon termination rights will give it an overwhelming bargaining advantage in such situations, even when Cox believes in good faith that its conduct complies with the agreement. Such forms of abuse are a particular danger because Verizon would have unfettered discretion to terminate Cox for perceived OSS abuses, but creates no standards by which those perceived abuses may be judged.[212]

Moreover, it is unclear exactly how Verizon will address any purported abuse of the OSS. In its responses to Cox interrogatories, Verizon indicated that OSS abuse would be determined pursuant to a complaint filed with a "regulatory authority."[213] In her testimony, however, Ms. Langstine indicated that Verizon itself would determine whether abuse has occurred.[214] The Commission should be wary of handing Verizon the authority it requests through this issue when it has neither defined the offense nor explained how the alleged wrongdoer will be pursued.

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[210] Cox Exhibit 28.
[211] Tr. at 2529 (Langstine) (describing OSS as "critical" to CLEC business).
[212] Given the opportunity to define the types of abuses that would lead it to terminate OSS access, Verizon gave only one concrete example – robotic use of the Web GUI – and Cox has attested to the fact that it does not engage in that practice. Tr. at 2541-43 (Langstine). Aside from that, all Verizon has told the Commission is that the violation will have to be "extensive" to justify termination.
[213] Cox Exhibit 25 (Langstine)
[214] Tr. at 2541, 2581-82.

Finally, as in the case of CPNI monitoring, Verizon could use the information it receives through monitoring use of OSS to detect spikes in Cox's business and thereby target its own marketing to the areas in which those spikes occur. Such abuse of the fruits of OSS monitoring could severely damage Cox's business prospects and there is nothing in Verizon's contract language to prevent it.[215]

In the end, the Commission is left with a proposal for contract language that Verizon does not need and should not have. Giving Verizon the ability to terminate Cox access to Verizon OSS would serve no useful purpose, and would subject Cox to needless risk of competitive injury. For these reasons, Verizon's proposal should be rejected.

[215] Tr. at 2559-60 (Langstine).

VIII. Conclusion

For all these reasons, Cox Virginia Telcom, Inc., respectfully requests that the Commission grant its Petition for Arbitration and order that the interconnection agreement between Cox and Verizon contain the proposed Cox provisions contained in the November JDPL and the contract filed by Cox on November 14, 2001.

Respectfully submitted,

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November 16, 2001

CERTIFICATE OF SERVICE

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